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The Contractual Obligations of a Successor Employer under Title I of the Labor Management Relations Act

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The Contractual Obligations of a Successor Employer under Title I of the Labor Management Relations Act[1]

When the employees of an enterprise within the jurisdiction of the Labor Management Relations Act[2] (LMRA) are organized prior to the sale of the business, a new owner, if deemed a successor employer by the National Labor Relations Board (Board) has certain obligations that may not have been incorporated into the purchase agreement. These "extra" obligations emanate from the Board's "successorship doctrine." The doctrine has no precise definition. It is a combination of Board rulings and decisions that evaluate the impact of a change of ownership in the employing unit on the rights of employers and employees under Title I of the LMRA.

The successorship doctrine imposes two general types of obligations on a successor employer—those of a contractual nature and those concerned with the duty to bargain. This comment will deal with the contractual obligations of a successor employer under Title I of the LMRA. Material will be included concerning the determination of successor status and the bargaining obligation it imposes to the extent that background information is necessary.

Disputes involving contractual obligations usually arise when a previous owner (predecessor employer) and an employees' bargaining representative have negotiated a collective bargaining agreement that has not, by its terms, expired prior to the change of ownership. The successor employer, who did not assume, nor was a party to the agreement, may think he is not bound to follow its terms. Prior to the Supreme Court decision in *NLRB v. Burns International Security Services, Inc.*,[3] there were two theories used by the Board, to impose on the successor employer obligations derived from this collective bargaining agreement. Both these theories had their origin in the duty to bargain.[4]

1. 29 U.S.C. § 151 (1970). Title I of the Labor Management Relations Act is the National Labor Relations Act, Act of July 5, 1935, ch. 372, § 1, 49 Stat. 449 as amended and supplemented by the Labor Management Relations Act of 1947, 29 U.S.C. § 141 (1970), and the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 (1970).
2. 29 U.S.C. § 141 (1970).
3. 406 U.S. 272 (1972). Respondent was formerly known as the William J. Burns International Detective Agency, Inc.
4. 29 U.S.C. § 158(a)(5) (1970). This section is commonly referred to as section 8(a)(5).

The first theory looked to the successor's unilateral conduct of changing terms and conditions of employment without bargaining to impasse with the employees' representative. The Board reasoned the successor's terms and conditions of employment were to be defined as the status quo immediately prior to the change of ownership. A successor employer, like any other employer, violated section 8(a)(5)[5] of the LMRA by unilaterally changing any term or condition of employment without first bargaining to impasse.[6] To remedy[7] the section 8(a)(5) violation, the Board ordered the successor employer to reinstate the status quo prior to the change of ownership and to "make whole" its employees for any losses they suffered by reason of the unilateral changes.[8] If a collective bargaining agreement between the predecessor employer and the employees' bargaining representative was in effect prior to the change of ownership, a reinstatement of the status quo would indirectly compel a successor to honor the agreement, at least until he had bargained to impasse.

The second theory looked to the successor's refusal to abide by the collective bargaining agreement. Prior to the decision in *William J. Burns International Detective Agency, Inc.*,[9] the Board had held that a successor employer was not bound to honor the pre-existing collective bargaining agreement between the predecessor and the employees' bargaining representative unless he had specificially assumed the obligations of the agreement.[10] In the *Burns* decision the Board announced this rule was to be changed. Thereafter, it was the position of the Board that a successor employer "stood in the shoes" of the predecessor and was

5. Section 8(a)(5) provides that: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ."

6. An employer's unilateral act of changing proper subjects of bargaining before impasse in negotiations has been held to be a per se refusal to bargain regardless of his subjective intent. NLRB v. Katz, 369 U.S. 736, 743 (1962). This rule was extended to successor employers in Overnite Transp. Co., 157 N.L.R.B. 1185 (1966), *enforced*, 372 F.2d 765 (4th Cir.), *cert. denied*, 389 U.S. 838 (1967).

7. The Board issues remedial orders pursuant to 29 U.S.C. § 160(c) (1970), commonly referred to as section 10(c). The section in its pertinent part provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . .

8. Overnite Transp. Co., 157 N.L.R.B. 1185, 1192 (1966), *enforced*, 372 F.2d 765 (4th Cir.), *cert. denied*, 389 U.S. 838 (1967).

9. 182 N.L.R.B. 348 (1970), *enforced in part*, 441 F.2d 911 (2d Cir. 1971), *aff'd*, 406 U.S. 272 (1972).

10. Rohlik, Inc., 145 N.L.R.B. 1236, 1242 n.15 (1964).

bound, in the absence of unusual circumstances, to honor and maintain the pre-existing collective bargaining agreement as though he were a signatory thereto. This ruling became known as the *Burns* rule. The Board reasoned that a successor's failure to maintain the agreement was "in effect" a violation of sections 8(d)[11] and 8(a)(5) of the LMRA. To remedy the section 8(a)(5) violation, the successor was ordered to abide by the agreement.[12] Unlike the unilateral change before impasse theory, a successor employer, under the *Burns* rule, was compelled to directly honor a pre-existing collective bargaining agreement.

I

The mere fact there has been a change of ownership in a business does not automatically deem the new employer a "successor." Before so labeling the new employer, the Board looks to the employing industry. If it has remained "essentially the same"[13] after the change of ownership, the new employer is found to be a "successor." The Board has attempted to provide guidelines for the application of this test by developing a checklist which includes certain factors that are considered when deciding if an industry has remained "essentially the same." The questions asked are:

> (1) [W]hether there has been a substantial continuity of the same business operations; (2) whether the new employer uses the same plant; (3) whether he has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same

11. 29 U.S.C. § 158(d) (1970). The section defines the bargaining obligation of the employer and the labor organization under sections 8(a)(5) and 8(b)(3) respectively. It provides in part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: PROVIDED, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . . .

12. 182 N.L.R.B. at 350.

13. Valleydale Packers, Inc., 162 N.L.R.B. 1486, 1490 (1967), *enforced*, 402 F.2d 768 (5th Cir. 1968). Incidental variations in the phrasing of this test include: Is the business after the change in ownership "substantially the same employment enterprise" as that carried on by the predecessor? Tom-A-Hawk Transit, Inc., 174 N.L.R.B. 124, 126, *enforced*, 419 F.2d 1025 (7th Cir. 1969); and Is there a "substantial continuity of identity" in the employing industry after the change of ownership? DIT-MCO, Inc., 171 N.L.R.B. 1458, 1462 (1968), *enforced*, 428 F.2d 775 (8th Cir. 1970).

> supervisors; (6) whether he uses the same machinery, equipment, and methods of production; and (7) whether he manufactures the same product or offers the same services.[14]

The number of possible variations in the application of the checklist means that no single response can be determinative of successor status. Certain factors on the checklist, however, are weighed more heavily than others. In *G.T. & E. Data Services Corp.*,[15] a trial examiner concluded the employing industry had not remained "essentially the same" by placing significant weight on the fact that the new employer had substantially different business objectives from those of the predecessor. The Board reversed saying:

> The basic error in the Trial Examiner's conclusion arises, in our view, from a misreading of the Board's "employing industry" concepts. In defining and applying the "employing industry" concepts, the Board with court approval, has always found that more significant weight should be attached to facts demonstrative of "the continued nature of the employment" (of a particular group of employees involved) rather than to the source of such employment.[16]

The focus on the employing industry from the viewpoint of employee continuity is consistent with Board precedent.[17] It has been established policy that the key factors in determining whether a change in the employing industry has occurred are those factors that reflect upon the employees' desire for continued representation by the established bargaining representative.[18] The one factor to which the Board has paid particular attention is the degree of re-employment of the predecessor's employees.[19] The Board's inquiry with respect to this factor is whether the new employer has the same, or substantially the same, work force. It has been indicated that the crucial fact to be evaluated is not so

14. Address by Board Member John H. Fanning, Annual Convention of the State Bar of Texas, Labor Law Section, July 7, 1967. The address was titled "The Purchaser and the Labor Contract—An Escalating Theory" and is published in 1967 BNA LAB. REL. YEARBOOK 284, 286. For an application of the checklist to a specific factual situation see J-P Mfg., Inc., 194 N.L.R.B. No. 161, 79 L.R.R.M. 1216 (1972).

15. 194 N.L.R.B. No. 102, 79 L.R.R.M. 1033 (1971).

16. 79 L.R.R.M. at 1035.

17. *See* Tom-A-Hawk Transit, Inc., 174 N.L.R.B. 124, *enforced*, 419 F.2d 1025 (7th Cir. 1969), where the new employer was found to be a successor even though there was no transfer of assets between him and the predecessor employer. *See also* Zayre Corp., 170 N.L.R.B. 1751, *enforced*, 424 F.2d 1159 (5th Cir. 1970), where a new employer, who introduced a more integrated, national management to replace localized, autonomous control was deemed a successor.

18. Ranch-Way, Inc., 183 N.L.R.B. No. 116, 74 L.R.R.M. 1389, 1391 (1970).

19. *See* J-P Mfg., Inc., 194 N.L.R.B. No. 161, 79 L.R.R.M. 1216, 1218-19 (1972).

much the number of the predecessor's employees that the new employer hires, but rather, the percentage of employees in the new employer's work force that were employees of the predecessor.[20] Similar working conditions, job functions, and supervisory hierarchy have also been found to be indications of the employees' desire for continued representation by the established bargaining representative.[21]

The Board's emphasis on the employees' desire for continued representation is not unusual in view of the bargaining obligation imposed on an employer if he is deemed a successor. A successor employer must assume the predecessor's obligation to bargain with the employees' majority representative. An unexcused failure to honor this obligation is violative of section 8(a)(5) of the LMRA, and an order requiring the successor to bargain with the representative is a proper remedy. The only lawful excuse a successor can have for refusing to bargain is a good faith doubt of the representative's continuing majority status. The mere change of ownership, however, cannot by itself create such doubt.[22]

For purposes of explanation assume the following hypothetical. A business is sold by employer *A* to employer *B*. On the date of transfer employer *A* terminates all employer-employee relationships. Employer *B* hires the entire employee complement of employer *A* and these employees constitute his entire work force. No changes are made in the operations of the business. Eighteen months before the change of ownership the employees of employer *A* conducted a plant-wide election in which union *X* was elected and certified as the exclusive representative of all the employees. After the change of ownership, union *X* makes a demand for collective bargaining upon employer *B*. Employer *B* refuses because no showing has been made to him that union *X* has continued to enjoy majority status after the change of ownership. Union *X* files an unfair labor practice charge against employer *B*.

Except for the fact that the employees are now paid by a new employer, the employing industry has remained the same after the change of ownership. Thus, in all probability, employer *B* would be deemed a successor. Not having shown any evidence of a good faith doubt as to union *X's* majority status, *B* would be held in violation of section 8(a)(5) of the LMRA and ordered to bargain with the union. The finding of a section 8(a)(5) violation creates a possible conflict with section

20. *Id.*; Hecker Mach., Inc., 198 N.L.R.B. No. 161, 81 L.R.R.M. 1253, 1255 (1972).
21. J-P Mfg., Inc., 194 N.L.R.B. No. 161, 79 L.R.R.M. 1216, 1220 (1972).
22. Rohlik, Inc., 145 N.L.R.B. 1236 (1964).

9(a)[23] of the LMRA. Under section 8(a)(5) an unfair labor practice is found only when the employer refuses to bargain collectively with the employees' representative, subject to the provisions of section 9(a). That section provides that representatives for collective bargaining purposes are "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees . . . ." A reading of section 8(a)(5) in conjunction with section 9(a) thus shows that a successor's refusal to bargain with a bargaining representative can be an unfair labor practice only if such representative enjoyed majority status at the time of the refusal. In the hypothetical, a majority of the employees had in fact selected a bargaining representative. But this was done eighteen months prior to the change of ownership and the successor's refusal to bargain. Whether that bargaining representative actually enjoyed majority status at the time of the successor's refusal to bargain is a question that the Board's successorship doctrine does not answer. The Board justifies its avoidance of the question by making the assumption that when the employing industry remains the same, the employees' desire for continued representation is not changed by the mere change of ownership.[24] This assumption is an extension of both Board and congressional policy that bargaining relationships, once established, should be protected.[25]

II

The Board, as early as 1938, has been faced with problems involving a change of ownership in a business enterprise in which employees were organized. In these early cases the Board focused on the relationship between the buyer and seller. If a business was sold to an entity for the purpose of avoiding a seller's bargaining obligation and the purchasing entity was in fact organized by the seller as a device to achieve this end, the seller was held to have committed a section 8(a)(5) unfair

23. 29 U.S.C. § 159(a) (1970).

24. Downtown Bakery Corp., 139 N.L.R.B. 1352 (1962), *enforced in part*, 330 F.2d 921 (6th Cir. 1964).

25. Section 9(c)(3) of the LMRA, 29 U.S.C. § 159(c)(3) (1970), provides that: "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." A bargaining representative certified pursuant to section 9(c)(1), 29 U.S.C. § 159(c)(1) (1970), is thus assured of a twelve month period during which even a loss of majority status cannot lead to an ouster or a lawful refusal to bargain by an employer. Brooks v. NLRB, 348 U.S. 96 (1954). After the certification year has run, a presumption of continuing majority status must be overcome before the bargaining representative can be challenged. Laystrom Mfg. Co., 151 N.L.R.B. 1482 (1965).

labor practice. He was ordered to bargain with the employees' bargaining representative.[26] This holding was based on an alter ego theory. The purchasing entity was viewed as a mere instrumentality or agent of the seller, and the seller, as its principal, was directed to order it to bargain with the employees' representative. Any attempt by the entity to dissipate the representative's majority status by refusing to rehire the seller's work force was held to be discrimination on the part of the seller and was proscribed under the same alter ego theory.[27]

Successorship language first appeared in the Board's decision in *Charles Cushman Co.*[28] For a valid business reason, a subsidiary corporation, after having been asked to recognize a union, sold its assets and transferred its employees to a newly formed subsidiary. The new subsidiary was found to be a successor and held to be under a duty to recognize and bargain with the union. The *Cushman* holding was significant because, unlike earlier cases, the change of ownership was not accomplished for purposes of avoiding a bargaining obligation. The Board concluded this distinction was unimportant where the change of ownership was merely nominal.[29]

The Board's focus on the relationship between the buyer and seller, in making a successor status determination, left unresolved the problem of a transfer of ownership to a bona fide transferee, *i.e.*, a buyer acting in good faith with no connection or ties to the seller. It was not long, however, before the Board looked beyond the buyer-seller relationship to concentrate on the employing industry. The shift of attention to the employing industry followed the rationale of *NLRB v. Colten.*[30] It was therein stated:

> It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace. . . . It needs no demonstration that the strife which is sought to be averted is no less an object of legislative solicitude when *contract,* death, or operation of law brings about change of ownership in the employing agency.[31]

The Board's new approach to change of ownership problems resolved the bona fide transferee question. Where there was no substantial

26. Hopwood Retinning Co., 4 N.L.R.B. 922, *modified & enforced,* 98 F.2d 97 (2d Cir. 1938).
27. *Id.* at 934-35.
28. 15 N.L.R.B. 90 (1939).
29. *Id.* at 102.
30. 105 F.2d 179 (6th Cir. 1939).
31. *Id.* at 183 (emphasis added).

change in the employing industry, even a bona fide transferee was held to have inherited the transferor's bargaining obligation.[32]

Although the Board was willing to look beyond the buyer-seller relationship in making a successorship determination, it would not similarly broaden its outlook on other matters related to change of ownership problems. It refused, for example, to extend a bargaining obligation to the extent that contractual obligations were imposed.[33] Thus, a pre-existing collective bargaining agreement of a predecessor was to be imposed only if the successor had specifically assumed it.[34]

The Supreme Court in 1964 decided *John Wiley & Sons, Inc. v. Livingston*,[35] a case brought under section 301[36] of the LMRA. Although section 301 is not within Title I of the LMRA, and, therefore, not subject to Board jurisdiction, what the Court said has had great impact on Board proceedings. In *Wiley*, a publishing company merged with a larger, successor publishing company. A number of the merging company's employees were hired by the successor. Prior to the merger a portion of the merging company's employees had been organized into a union and a collective bargaining agreement containing an arbitration clause had been executed. This agreement had not expired as of the merger date. The union claimed that the change of ownership did not change its representative status regarding employees who had been previously represented and who had retained their jobs. It also claimed that the successor was bound by the pre-existing collective bargaining agreement, as least sufficiently to require him to arbitrate claims concerning certain vested employee rights. When the successor refused to comply with the union's demands, the union instituted a breach of contract action pursuant to section 301 to compel the successor to arbitrate the effects of the merger on the pre-existing bargaining agreement. The Court held that a change of ownership did not automatically terminate all rights of the employees under the agreement, and that ". . .

32. Simmons Eng'r Co., 65 N.L.R.B. 1373, 1377 (1946); South Carolina Granite Co., 58 N.L.R.B. 1448, 1462-63 (1944), *enforced sub nom.* NLRB v. Blair Quarries, Inc., 152 F.2d 25 (4th Cir. 1945).

33. Cruse Motors, Inc., 105 N.L.R.B. 242, 248 (1953).

34. Rohlik, Inc., 145 N.L.R.B. 1236 (1964).

35. 376 U.S. 543 (1964).

36. 29 U.S.C. § 185 (1970). Section 301 is under Title III of the LMRA. It provides in part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement."[37]

In setting aside the successor's contention that it was not a signatory to the agreement and therefore not bound by contract law to honor the arbitration provision, the Court relied on *Textile Workers Union of America v. Lincoln Mills*.[38] It was therein held that the substantive law applicable to section 301 suits was federal law derived from the policy considerations of the national labor laws.[39] In order to determine the mandates of this federal law as applied to the facts in *Wiley*, the Court balanced the right of owners to arrange their business, and even eliminate themselves as employers, against the need for employee protection in the face of a sudden change in the employment relationship. The Court, in striking this balance, recognized that arbitration avoids industrial strife and thereby plays a central role in national labor policy. Unable to find any compelling consideration to counterbalance the importance of arbitration, the Court concluded the successor had to arbitrate the effects of the merger on the pre-existing collective bargaining agreement.[40]

Two aspects of the *Wiley* decision left unclear the significance to Board proceedings of its holding. First, the union did not seek a judgment on the merits of its earlier claim that the successor was bound per se to all the terms of the bargaining agreement; and secondly, the Court specifically disclaimed any opinion as to Board proceedings.[41] In view of these limitations, *Wiley* can be read simply as a logical extension of the Court's current reliance on arbitration as a means of effectuating national labor policy.[42] As such, its only value is precedent in the development of the "federal law" in section 301 suits. The Board

37. 376 U.S. at 548.
38. 353 U.S. 448 (1957).
39. *Id.* at 456.
40. 376 U.S. at 549-50.
41. *Id.* at 551.
42. *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), where the Court compared arbitration under an ordinary commercial contract with arbitration under a collective bargaining agreement. It was therein noted:

> . . . the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

Id. at 578.

indicated in *Overnite Transportation Co.*,[43] however, that *Wiley* would in fact have an impact on its proceedings involving a change of ownership. It was the *Overnite* decision which developed the first theoretical basis for the Board's imposition of contractual obligations on a successor employer.

In *Overnite*, the Board reasoned that *Wiley*, at the very least, was authority for the extension to a successor of its previously enunciated rule that an employer had to first bargain to impasse with the employees' bargaining representative before unilateral changes in terms and conditions of employment could be made.[44] The Board's rationale for this extension incorporates language from *Wiley*:

> Although the Union had tried to protect the employees' post-takeover interests by its pretakeover bargaining with the seller and its pretakeover efforts to deal with the purchaser, its efforts with the purchaser were nullified by Overnite's refusal to recognize and bargain with it until after Overnite unilaterally changed the very wages, hours, and working conditions the Union was trying to protect and was then bargaining with the seller about. . . . Under these circumstances the objectives of national labor policy require that *"the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."*
>
> The only protective balancing that is available in the present situation is that the employees be given the protection and assistance of collective bargaining before the change in corporate ownership is permitted to alter their economic relationship with their employer.[45]

As a result of the Board's decision, a successor employer, upon the takeover of a business was bound to maintain the status quo as it existed prior to the change of ownership until he had first bargained to impasse with the employees' bargaining representative. By means of a successor's obligation to bargain, the Board imposed upon a successor employer, for a period of time, the predecessor's terms and conditions of employment.

The Board decision in *Overnite* did not go so far as to impose per se

43. 157 N.L.R.B. 1185 (1966), *enforced*, 372 F.2d 765 (4th Cir.), *cert. denied*, 389 U.S. 838 (1967).

44. *Id.* at 1190. The rule as it applies to an ordinary employer was first enunciated by the Board in Benne Katz, 126 N.L.R.B. 288 (1960), *enforcement denied*, 289 F.2d 700 (2d Cir. 1961), *rev'd*, 369 U.S. 736 (1962).

45. *Id.* at 1189-90 (emphasis added).

a predecessor's collective bargaining agreement on a successor employer. Whether or not such an imposition could be made was an issue that the Board was able to avoid in *Overnite* because a pre-existing collective bargaining agreement had not been in effect prior to the change of ownership. Although the Board's General Counsel immediately raised this issue in cases[46] subsequent to *Overnite*, the Board did not squarely face it until 1970 when *William J. Burns International Detective Agency, Inc.*,[47] and three companion cases[48] were decided.

III

The facts in *Burns* show that the Wackenhut Corporation (Wackenhut) performed plant protection services for the Lockheed Aircraft Service Company (Lockheed). Before its contract with Wackenhut expired, Lockheed invited bids from other protection service contractors. At a pre-bid conference attended by the William J. Burns Detective Agency (Burns) and several other protection service contractors, Lockheed advised bidders that the United Plant Guards (Plant Guards) had been recently certified as the exclusive bargaining representative for all full and part-time guards employed by Wackenhut at the Lockheed facility. It also gave notice that Wackenhut and the Plant Guards had agreed to a collective bargaining agreement, which expired after the termination date of the employment contract between Lockheed and Wackenhut. Lockheed awarded the service contract to Burns. The protection service to be provided by Burns was basically the same as that provided by Wackenhut.

Burns hired a total of forty-two guards. Twenty-seven of these guards had been Wackenhut employees at the Lockheed facility. In its pre-takeover hiring, Burns assisted a rival union by soliciting membership from prospective employees and later by recognizing the rival union as the bargaining representative for its work force at Lockheed. The Plant Guards demanded that Burns recognize it as the sole bargaining representative for all guards employed at the Lockheed facility. A demand was also made that Burns honor the collective bargaining agree-

46. Michaud Bus Lines, Inc., 171 N.L.R.B. 193 (1968); Valleydale Packers, Inc., 162 N.L.R.B. 1486 (1967).
47. 182 N.L.R.B. 348 (1970), *enforced in part*, 441 F.2d 911 (2d Cir. 1971), *aff'd*, 406 U.S. 272 (1972).
48. Travelodge Corp., 182 N.L.R.B. 370 (1970); Kota Div. of Dura Corp., 182 N.L.R.B. 360 (1970); Hackney Iron & Steel Co., 182 N.L.R.B. 357 (1970).

ment that had been in existence prior to the award to Burns of the service contract. When these demands were rejected the Plant Guards filed unfair labor practice charges against Burns. The Board found that Burns was a successor employer and was under a section 8(a)(5) duty to bargain with the Plant Guards. It further found that Burns violated section 8(a)(5) by refusing to abide by the pre-existing collective bargaining agreement between Wackenhut and the Plant Guards.[49]

The Board relied on the *Wiley* case. It reasoned that the Supreme Court's refusal to apply contract doctrine to resolve the *Wiley* issue altered the perspective from which to view a successor's obligation to honor a predecessor's collective bargaining agreement. The mere fact that a successor was not a signatory to the agreement was no longer determinative of the section 8(a)(5) issue.[50] The de-emphasis of contract doctrine was a complete turnabout from the Board's pre-*Wiley* decisions.[51] *Wiley's* influence on the Board is reflected in the statement of the issue in *Burns*:

> The question before us thus narrows to whether the national labor policy embodied in the Act requires the successor employer to take over and honor a collective bargaining agreement negotiated on behalf of the employing enterprise by the predecessor.[52]

In resolving this issue, the Board emphasized the role of collective bargaining agreements in the stabilization of labor relations and the prevention of industrial strife. It concluded that these policy considerations favored the preservation of pre-existing collective bargaining agreements and that they were not outweighed by the fact that a successor had not been a signatory to the agreement.[53] The Board felt the implementation of its holding, *i.e.*, ordering Burns to honor the pre-existing agreement between Wackenhut and the Plant Guards, created no conflict with the section 8(d) prohibition. Section 8(d), in this context, provides that the section 8(a)(5) bargaining duty is not to be construed as mandating that an employer agree to proposals or make concessions. The Board found that the section 8(d) prohibition was not applicable to the successorship problem posed in *Burns* because there

49. 182 N.L.R.B. at 350. Violations of sections 8(a)(1), 29 U.S.C. § 158(a)(1) (1970) and 8(a)(2), 29 U.S.C. § 158(a)(2) (1970) were also found but are not relevant to this paper.
50. 182 N.L.R.B. at 350.
51. Rohlik, Inc., 145 N.L.R.B. 1236, 1242 n.15 (1964); Cruse Motors, Inc., 105 N.L.R.B. 242, 248 (1953).
52. 182 N.L.R.B. at 350 (emphasis added).
53. *Id.*

was an agreement in effect within the employing industry.[54] It further found no inequity resulted from the imposition of this agreement upon a successor. In a change of ownership situation, a successor employer, unlike employees, can protect himself by making adjustments in the negotiation of the purchase agreement.[55] Considering all these factors, the Board concluded:

> . . . Burns is bound to that contract as if it were a signatory thereto, and that its failure to maintain the contract in effect is violative of Sections 8(d) and 8(a)(5) of the Act.[56]

By finding a successor's refusal to comply with a predecessor's bargaining agreement a section 8(a)(5) violation, the Board extended the successorship doctrine to its furthest extreme. Where a collective bargaining agreement was part of the pre-transfer status quo, the *Overnite* approach had only gone so far as to impose the terms and conditions of the agreement until the successor bargained to impasse. Implicit in the *Overnite* rule was the right of a successor to make changes after impasse had been reached. The *Burns* rule took this right away from a successor.

Strict liability was not created for the successor who refused to honor the pre-existing collective bargaining agreement of the predecessor. The Board made it clear the *Burns* rule was applicable only "in the absence of unusual circumstances." This qualification was applied in three subsequent Board decisions.[57] An analysis of these decisions indicates that unusual circumstances will be found where a particular factual situation does not support the foundation upon which the *Burns* rule stood. For example, when a particular governmental ruling prevents a successor from taking into account the effects of a pre-existing collective bargaining agreement in his contract negotiations, no compliance with the pre-existing agreement is required. A successor will prevail in this situation because the successor could not possibly have protected himself by making adjustments in the purchase price.[58]

The Board's decision in *Burns* also had an effect on a successor's bargaining obligation. As discussed above, a successor employer has a

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54. *Id.*
55. *Id.*
56. *Id.*
57. G.T. & E. Data Servs. Corp., 194 N.L.R.B. No. 102, 79 L.R.R.M. 1033 (1971); Emerald Maintenance, Inc., 188 N.L.R.B. No. 139, 76 L.R.R.M. 1437 (1971); Davenport Insulation, Inc., 184 N.L.R.B. No. 114, 74 L.R.R.M. 1726 (1970).
58. *See* Emerald Maintenance, Inc., 188 N.L.R.B. No. 139, 76 L.R.R.M. 1437 (1971).

duty to bargain with the employees' majority representative. This duty exists unless the successor asserts a good faith doubt of the representative's majority status. There are times, however, when a good faith doubt of majority status cannot be asserted. If a majority representative has been certified following a Board-conducted election, such doubt, in the absence of unusual circumstances, cannot be asserted for a period of one year following the certification.[59] When a collective bargaining agreement has been executed, the Board's contract bar doctrine provides that in the absence of unusual circumstances, an employer cannot challenge the representative's majority status for a period in which the agreement bars a question of representation. Agreements for a definite term, up to three years, bar a question of representation for that period. Agreements for terms longer than three years are treated as three-year agreements and will bar a question of representation for three years.[60] Prior to the *Burns* decision, a successor employer who did not assume the pre-existing agreement, was precluded from challenging the majority status of the representative only during the certification period.[61] This was one year. After *Burns*, the Board held that the contract bar doctrine would be applied to a successor. He was to be precluded from challenging the representative's majority status for the period of time in which the agreement was a bar.[62]

The *Burns* rule met with mixed reaction from the courts.[63] The Court of Appeals for the Second Circuit reversed *Burns* to the extent that it required a successor to honor the pre-existing collective bargaining agreement.[64] Despite the Second Circuit reversal, the Board indicated in *Sacramento Automotive Association*[65] it would continue to apply the *Burns* rule in change of ownership cases. Prior to the

59. 29 U.S.C. § 159(c)(1) (1970).
60. General Cable Corp., 139 N.L.R.B. 1123 (1962).
61. The contract bar doctrine applied to a successor only if he assumed the pre-existing collective bargaining agreement. In addition, such an assumption had to be expressed in writing. MV Dominator, 162 N.L.R.B. 1514, 1516 (1967).
62. Ranch-Way, Inc., 183 N.L.R.B. No. 116, 74 L.R.R.M. 1389 (1970). The Board therein held:

> . . . the normal presumption of union majority status which attaches during the term of a contract executed by the predecessor employer applies equally to its successor, and that the successor employer may not during the life of the contract, assert a doubt as to its obligation to bargain with the incumbent union.

74 L.R.R.M. at 1392.
63. The Board enforces an order by petitioning a United States court of appeals pursuant to section 10(e). 29 U.S.C. § 160(e) (1970). A person aggrieved by a final order of the Board may seek review in a United States court of appeals pursuant to section 10(f). 29 U.S.C. § 160(f) (1970).
64. 441 F.2d 911 (2d Cir. 1971).
65. 193 N.L.R.B. No. 117, 78 L.R.R.M. 1334, 1336 n.8 (1971).

Supreme Court's decision in *Burns*, only the Tenth Circuit had ruled in favor of the application of the *Burns* rule while both the Second and Sixth Circuits refused to apply it.[66]

The Supreme Court in *NLRB v. Burns International Security Services, Inc.*[67] reversed the Board's decision and refused to apply the *Burns* rule. The Court concluded Burns had a duty to bargain with the Plant Guards,[68] but from such duty it did not follow that Burns was obligated to honor the substantive terms and conditions of the pre-existing collective bargaining agreement:

> . . . in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract. Such a duty does not, however, ensue as a matter of law from the mere fact that an employer is doing the same work in the same place with the same employees as his predecessor, as the Board had recognized until its decision in the instant case. We accordingly set aside the Board's finding of a § 8(a)(5) unfair labor practice insofar as it rested on a conclusion that Burns was required to but did not honor the collective-bargaining contract executed by Wackenhut.[69]

The Court's rationale notes the *Burns* rule violates the fundamental theme of Title I that there be compulsion of bargaining but not compulsion of agreement. It cites the section 8(d) prohibition as an express statutory mandate of this theme. The Court agreed with the Board that industrial peace and stability are goals of national labor policy. It points out, however, that these goals are not to be purchased at the price of an employer's freedom of contract.[70] In this sense it was felt the Board failed to heed the admonition of *H.K. Porter Co. v. NLRB*:[71]

> [W]hile the Board does have power . . . to require employers and

66. NLRB v. Interstate 65 Corp., 453 F.2d 269 (6th Cir. 1971); Ranch-Way, Inc. v. NLRB, 445 F.2d 625 (10th Cir. 1971); William J. Burns Int'l Detective Agency, Inc., 441 F.2d 911 (2d Cir. 1971).

67. 406 U.S. 272 (1972).

68. *Id.* at 281. *Burns* tacitly approved the Board's successorship doctrine to the extent that it imposed on a successor employer a duty to bargain with the employees' bargaining representative. The Court therein stated:

> . . . where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union.

Id.

69. *Id.* at 291 (citations omitted).

70. *Id.* at 287.

71. 397 U.S. 99 (1970).

> employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.[72]

The Board's reliance on the *Wiley* decision as authoritative support for its departure from contract law was found to be improper. The Court held *Wiley* not to be controlling because it arose in the context of a section 301 suit which was not limited by the statutory prohibition of section 8(d). It was emphasized that *Wiley* turned on the national labor policy favoring the arbitration of industrial disputes and the opinion in no way warrants the Board's conclusion that an employer commits an unfair labor practice if he does not honor a predecessor's pre-existing collective bargaining agreement.[73]

Finally, the Court concluded the *Burns* rule may result in serious inequities. A successor may be willing to purchase a business that is doing poorly only if he can make immediate changes. If the *Burns* rule is applied such changes would be impossible and two employers, one who wants "in" and one who wants "out," would be precluded from changing their positions.[74]

IV

A reading of the Supreme Court's opinion in *Burns* reveals the Court paid little attention to the Board's rationale used to avoid the section 8(d) conflict. The Board emphasized the imposition of a pre-existing collective bargaining agreement on a successor was distinguishable from the practice prohibited by section 8(d). That prohibition was against construing a section 8(a)(5) bargaining obligation to compel an employer to agree to a proposal or make a concession. In other words, the Board argued that because the *Burns* rule was applied only in situations where there had been agreement to terms and conditions in the employing industry, the section 8(d) prohibition was not applicable.[75]

The legislative history of section 8(d) supports the Board's position. The National Labor Relations Act[76] (NLRA) was the beginning of

72. 406 U.S. at 283, *citing* 397 U.S. at 102.
73. 406 U.S. at 285-86.
74. *Id.* at 287-88.
75. 182 N.L.R.B. at 350.
76. Act of July 5, 1935, ch. 372, § 1, 49 Stat. 449. This Act is commonly known as The Wagner Act.

modern labor legislation in the United States. It was enacted in 1935 with the belief that industrial strife and unrest would be mitigated if the practice and procedure of collective bargaining were encouraged. This encouragement was the basic theme of the NLRA.[77] Although neither section 8(d) nor a similar provision was a part of the NLRA, Congress made it abundantly clear the government's role was only to protect the collective bargaining process. The government was not to become a party to the negotiations. In a report accompanying the NLRA, the Senate Committee on Education and Labor stated:

> The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to determine whether proposals made to it are satisfactory.[78]

The Labor Management Relations Act of 1947[79] amended and supplemented the NLRA. One of the amendments was the addition of subsection (d) to the unfair labor practices of section 8. The purpose of the amendment was to remedy what Congress thought to be a glaring weakness of the NLRA. Under the NLRA, an employer committed an unfair labor practice if he refused "to bargain collectively with the representative of his employees . . . ."[80] Nowhere in the NLRA, however, was there a standard or guide for the Board to follow when making this unfair labor practice determination. The subsection (d) amendment was added for this purpose. The committee report submitted by Representative Hartley, to accompany what eventually became the Taft-Hartley Act emphasized this purpose:

> [T]he present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not take . . . .
>
> [U]nless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further

77. *See* Act of July 5, 1935, ch. 372, § 1, 49 Stat. 449.
78. S. REP. No. 573, 74th Cong., 1st Sess. 12 (1935).
79. 29 U.S.C. § 141 (1970). This Act is commonly known as the Taft-Hartley Act.
80. Act of July 5, 1935, ch. 372, § 8(5), 49 Stat. 453.

and seek to control more and more the terms of collective bargaining agreements.[81]

It is clear section 8(d), notwithstanding the policy considerations favoring industrial peace and stability, was designed to specifically prevent governmental intervention in the negotiation of a collective bargaining agreement. Congress did not want the Board to assume a role by which it imposed the actual terms to an agreement.[82] This is not to say, however, that governmental intervention is to be proscribed after an agreement has been made within an employing industry. On the contrary, section 8(d) provides for governmental intervention when an agreement is terminated or modified.[83] Without question, the *Burns* rule involves a problem of Board intervention into the domain of contractual obligations; but this domain is only invaded after an agreement in the employing industry has been made and prematurely terminated. The Board is not mandating to the negotiating parties what proposals must be agreed upon and what concessions must be made in order to avoid a failure to bargain charge. In a sense, the *Burns* rule is not so much concerned with imposing an agreement on a successor as it is with promoting the collective bargaining process by protecting the end product of prior bargaining in an employing industry. To this extent the *Burns* rule is distinguishable from the section 8(d) prohibition.

In *Burns*, the Court criticized the Board for its failure to heed the *Porter* decision. The merit of this criticism is questionable. In *Porter* the Court held the Board's remedial power under section 10(c) was not broad enough to permit it to order an employer, who had bargained in bad faith during contract negotiations, to agree to a substantive contractual provision. The section 8(d) prohibition was not found to be literally applicable because the unfair labor practice was determined apart from the employer's failure to agree to a proposal or make a concession. The Court, however, relied upon that section's legislative

81. H.R. REP. No. 245, 80th Cong., 1st Sess. 19-20 (1947).

82. *See* NLRB v. Insurance Agents, 361 U.S. 477 (1960), where the Court evaluated the legislative history of section 8(d) and concluded that it was an attempt by Congress, ". . . to prevent the Board from controlling the settling of the terms of collective bargaining agreements." *Id.* at 487.

83. The proviso to section 8(d) states:
That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . . .

history as authoritative support for its limitation on the scope of the Board's remedial power under section 10(c).[84]

Unlike *Burns*, the Board in *Porter* was involved in the initial determination of an agreement's terms and conditions. The *Burns* rule, strictly speaking, does not impose terms and conditions to an agreement. Terms and conditions had been previously agreed to in the employing industry. On the surface, this distinction appears to be superfluous. The distinction does have merit, however, if the section 8(d) prohibition is interpreted in view of its legislative history. In this sense, the prohibition only refers to the initial making of an agreement. It was not intended to, nor does it specifically deal with an agreement already in existence.

The Court in *Burns* did not agree with the Board's treatment of the *Wiley* decision. While it is true that the *Wiley* holding was narrowly phrased[85] in the context of a section 301 suit under Title III of the LMRA, there is language in the opinion which makes the Court's consideration of its value to Board proceedings incomplete. In *Wiley*, policy considerations favoring arbitration were relied upon by the Court to support the conclusion that the arbitration provision of a pre-existing collective bargaining agreement survived a change of ownership.[86] The *Wiley* rationale, however, also encompassed criteria relevant to Board proceedings involving successorship problems.

The Court in *Wiley* recognized that employees, and the unions which represent them, ordinarily do not take part in the negotiations leading to a change of ownership. National labor policy, therefore, requires their interest be protected.[87] This recognition of the need for employee protection in a change of ownership situation, and the method by which it was accomplished in *Wiley*, was not ignored by the Board in the formulation of the *Burns* rule.[88] It must, of course, be noted that *Wiley* involves private litigants under Title III of the LMRA,

84. 397 U.S. at 107-08.
85. The Court in *Wiley* held that:
. . . the disappearance by merger of a corporate employer which has entered into collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.
376 U.S. at 548.
86. 376 U.S. at 549.
87. *Id.*
88. 182 N.L.R.B. at 350.

whereas Board jurisdiction is governed by Title I. The findings and policies of the LMRA, however, apply equally to both Title I and Title III. Thus, a statement of national labor policy in a section 301 case[89] is not irrelevant to Board proceedings.

In *Burns*, the Board paid particular attention to the departure from contract doctrine in *Wiley*. The Court in *Wiley* cited *Lincoln Mills*[90] as authority for the departure. It added, however, that a collective bargaining agreement "[i]s not an ordinary contract."[91] The peculiar status and function of a collective bargaining agreement had been noted earlier by the Court in *United Steelworkers of America v. Warrior & Gulf Co.*[92] It was there stated:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.[93]

This characterization of a collective bargaining agreement was cited with approval in *Wiley*.[94] There seems to be no reason for the Board not to consider the peculiar status and function of a collective bargaining agreement in a Board proceeding. Its special nature does not change merely because Title I is involved, rather than Title III of the LMRA. Once it was recognized in *Wiley* that a collective bargaining agreement is not an ordinary contract, the Court felt free to balance policy considerations that outweighed the successor's argument for the application of contract law. There is nothing in *Wiley* that indicates the policy considerations therein applied are the only ones that can be placed in the balance, or that the courts have a monopoly on the use of the scale.

The Court in *Wiley* emphasized that its holding was not to be applied in every case involving a change of ownership. The scope of the holding was to be limited to cases in which there existed a substantial continuity in the business enterprise before and after the change.[95] This limitation would be of particular interest to the Board because

89. A section 301 suit, 29 U.S.C. § 185 (1970), is brought under Title III of the LMRA.
90. 353 U.S. 448 (1957).
91. 376 U.S. at 550.
92. 363 U.S. 574 (1960).
93. *Id.* at 578-79 (citations omitted).
94. 376 U.S. at 550.
95. *Id.* at 551.

it determines both successor status and the obligations resulting therefrom by applying the same test.

The Court's approach to *Burns* was correct to the extent that it recognized a problem involving a conflict in national labor policy. National labor policy espouses freedom of contract. To a certain degree, the *Burns* rule is an intrusion upon this freedom. An equally important labor policy is the promotion of industrial peace and stability. Title I of the LMRA attempts to reach these ends by equalizing the bargaining power of employees and employers. Equalization of bargaining power is best attained by assuring and guaranteeing the rights of employees to organize and bargain collectively through their elected representatives. A major purpose of the section 8(a)(5) duty to bargain is to make meaningful these fundamental rights. The *Burns* rule serves this end by protecting the status of the pre-existing collective bargaining agreement, the end product of previous collective bargaining.

No balance was reached between these conflicting national labor policies. The Court's disregard of *Wiley*, its emphasis upon the section 8(d) prohibition, and the *Porter* case show that only the labor policy of contractual freedom was considered in the resolution of the conflict posed by the *Burns* rule. By failing to put all the weights on the scale, the conflict was not truly resolved. It is suggested the Court should not have completely disregarded *Wiley*. Also, the section 8(d) prohibition and the *Porter* case should not have been viewed as necessarily mandating the Court's decision in *Burns*. If this suggestion would have been followed, a decision of more precedental value would have been reached.

In one sense, this criticism of the Court may be mitigated. It can be argued that the Court, in looking at the equities of the *Burns* rule, directly faced the resulting conflict in labor policies. But again, the Court only looked at the equities from one side of the conflict. Only the adverse effect on the successor employer's freedom of contract was considered.[96] A complete appreciation of the conflict would have included a consideration of the beneficial aspects of the rule. It has been recognized that there is a direct relationship between industrial stability and the maintenance of a collective bargaining agreement previously executed.[97] The Court in *Burns* totally ignored the effect

96. 406 U.S. at 289-90.
97. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

of removing such an agreement after the change of ownership. Employee rights, such as seniority and pension benefits, once secured under a previously negotiated collective bargaining agreement, are suddenly jeopardized. The *Burns* rule protects the interests of employees in a transaction between a buyer and a seller. The protection of the interests of a third party in a transaction between a buyer and a seller is not a strange and unique concept[98] and should have merited consideration by the Court.

Perhaps the Court's rejection of the *Burns* rule was correct in spite of the narrow approach used to reach the decision. Even so, the Court's rationale is significant because of the precedent it creates regarding the scope of the Board's remedial power under section 10(c). The almost total reliance by the Court on the section 8(d) prohibition to resolve conflicts in national labor policy, when the section is not specifically applicable, indicates any remedial order directly compelling an unwilling party to agree to a contractual provision will be seriously questioned. As discussed above, the section 8(d) prohibition was enacted to specifically limit the Board's application of section 8(a)(5) to the extent that a bargaining obligation was construed to mean an employer had to agree to a proposal or make a concession during the negotiation of a contract. The prohibition was not enacted to resolve conflicts in labor policy resulting from the independent finding of other unfair labor practices. It has been recognized that:

> Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.[99]

The language and approach of the Court to *Burns* suggests this guard has been dropped and the slide begun.

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98. *See* UNIFORM COMMERCIAL CODE §§ 6-101 to 6-111 (1972 version). The purpose of this legislation is to protect the interests of the creditor to a predecessor entity in a transaction involving the sale of a business. Duties are imposed on the transferor and transferee that must be complied with before the transfer is held to be effective as against any creditor of the transferor. *See also* 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7121 (1961), wherein it is noted:

> In case of merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues in existence, the latter corporation is liable for the debts, contracts and torts of the former, at least to the extent of the property and assets received, and this liability is often imposed by statute.

99. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

V

The Supreme Court decision in *Burns*, to a large extent, eliminated a successor's concern that it may be acquiring more liabilities than immediately appear on the face of the purchase agreement. It is clear from the Court's decision that the *Burns* rule is now overruled.[100] A conclusion that a successor need not concern himself with the contractual obligations of the successorship doctrine, however, may be a bit premature. Indirect imposition of the predecessor's collective bargaining agreement may yet be achieved by the surviving remnants of the *Overnite* theory.

The Court dealt with the *Overnite* theory when it disagreed with the Board's alternative contention that Burns was liable for employee losses caused by unilateral changes made before bargaining had reached an impasse. In this respect, the unilateral act of a successor employer was found to be distinguishable from similar acts of an ordinary employer. The Supreme Court noted the distinction when it stated:

> Although Burns had an obligation to bargain with the union concerning wages and other conditions of employment when the union requested it to do so, this case is not like a § 8(a)(5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative. It is difficult to understand how Burns could be said to have changed unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit, and prior to July 1 [date of the Burns take over of operations], no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that Burns changed its terms and conditions of employment . . . .[101]

The conclusion that Burns had no outstanding terms and conditions of employment prior to its starting of operations was an implicit reversal

100. Subsequent to the Court's decision in *Burns*, the Board has held that the contract bar doctrine is not applicable to a successor unless the pre-existing collective bargaining agreement is assumed by it in writing. Great Atlantic & Pacific Tea Co., 197 N.L.R.B. No. 104, 80 L.R.R.M. 1445 (1972).

101. 406 U.S. at 294.

of *Overnite*. There is language in the *Burns* opinion, however, that creates doubt as to the extent of the reversal.

The Court decided a successor employer, as a general rule, is free to set initial terms and conditions of employment without first bargaining with the employees' representative.[102] When it is clear that the successor plans to retain all the employees in the bargaining unit, an exception to the general rule is recognized. A successor, in that case, must first consult with the bargaining representative before initial terms and conditions can be fixed.[103] While the Court's language is not completely clear, it can be inferred that no bargaining on initial terms and conditions is required of the successor employer until the bargaining obligation has matured. The general rule assumes that a successor hires his employee complement in a piecemeal fashion. Under this method of hiring, the bargaining obligation does not mature until some time after initial terms and conditions have been offered to the first employees hired. Since the setting of the initial terms and conditions pre-date the maturation of the bargaining obligation, the successor does not commit an unfair labor practice. The exception deals with the situation when initial terms and conditions of employment are not set until after the maturation date of the bargaining obligation. In this instance, a successor must first bargain in good faith before setting such terms and conditions. A failure to bargain results in an unfair labor practice and it is implied a "make whole" order will issue.[104] The issuance of a "make whole" order, however, is inconsistent with the Court's finding that a successor has no terms and conditions of employment prior to its own initial determination. Thus, in the limited situation when the exception applies and a successor employer

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102. *Id.*
103. *Id.* at 295.
104. *Id.* The Court applies the rules to the facts in *Burns*:

> . . . Burns' obligation to bargain with the union did not mature until it had selected its force of guards late in June. . . . It is true that the wages it paid when it began protecting the Lockheed plant on July 1 differed from those specified in the Wackenhut collective-bargaining agreement, but there is no evidence that Burns ever unilaterally changed the terms and conditions of employment it had offered to potential employees in June after its obligation to bargain with the union became apparent. If the union had made a request after Burns had completed its hiring and if Burns had negotiated in good faith and had made offers to the union which the union rejected, Burns could have unilaterally initiated such proposals as the opening terms and conditions of employment on July 1 without committing an unfair labor practice.

For the Board's application of the general rule and the exception see Hecker Mach., Inc., 198 N.L.R.B. No. 161, 81 L.R.R.M. 1253 (1972); Howard Johnson Co., 198 N.L.R.B. No. 98, 80 L.R.R.M. 1769 (1972).

fails to bargain, *Overnite* is a viable theory that can be used to indirectly impose contractual obligations.

The lack of clarity in the Court's enunciation of these rules has caused problems in their application. The Board has concluded it is not necessary that the successor plan to hire the predecessor's work force *in toto* before the exception comes into play. It has extended the Court's exception to cases where "substantially" the entire employee complement of the predecessor is taken over before the initial terms and conditions have been set.[105] The extension appears to be valid since it conforms with the premise upon which the exception was founded, *i.e.*, maturation of the bargaining obligation before the initial setting of terms and conditions. There has not been, however, any indication whether the Board's view in this regard will be sustained.

When the exception applies, it is clear the successor must bargain with the employees' representative before initial terms and conditions are set. It is not clear how long this bargaining must continue. The language used by the Court suggests a successor employer need only bargain to the point in time it begins operations. If no agreement has been reached, the successor can then unilaterally set the initial terms and conditions of employment.[106] At least one circuit court has taken a different view. In *NLRB v. Bachrodt Chevrolet Co.*,[107] the Court of Appeals for the Seventh Circuit noted that in such a situation, a fair reading of *Burns* required a successor first bargain to impasse before taking any unilateral action. There is also a difference of opinion as to the existence of the exception itself. Unlike the Board[108] and the Seventh Circuit,[109] the Sixth Circuit[110] has interpreted *Burns* to create the rule that a successor is free to set initial terms and conditions regardless of maturation. As a result it has held that a successor's unilateral act of changing terms and conditions of employment one month after the change of ownership, and after the maturation of the bargaining obligation, is permissible because it is merely a setting of initial terms and conditions.[111]

105. S-H Food Serv., Inc., 199 N.L.R.B. No. 4, 81 L.R.R.M. 1181, 1182 (1972).
106. *See* 406 U.S. at 294-95.
107. 81 L.R.R.M. 2244 (7th Cir. 1972).
108. Howard Johnson Co., 198 N.L.R.B. No. 98, 80 L.R.R.M. 1769 (1972).
109. NLRB v. Bachrodt Chevrolet Co., 81 L.R.R.M. 2244 (7th Cir. 1972).
110. NLRB v. Wayne Convalescent Center, Inc., 465 F.2d 1039 (6th Cir. 1972).
111. *Id.*

It is suggested that further litigation and conflict will result from the Court's lack of precision in dealing with the *Overnite* theory. A clarification by the Supreme Court will be necessary. Until this is done, a successor's contractual obligation under Title I of the LMRA will be, notwithstanding the *Burns* decision, an unsettled area of the law.

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